

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LEON R. SNOE

Claimant

VS.

U.S.D. NO. 501

Respondent

Self-Insured

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Docket No. 201,457

ORDER

Claimant appeals from the Award of Administrative Law Judge Bryce D. Benedict dated October 30, 1998, wherein the Administrative Law Judge denied claimant benefits, finding claimant had not proven accidental injury arising out of and in the course of his employment on the date alleged. Oral argument was held May 18, 1999.

APPEARANCES

Claimant appeared by his attorney, Roger D. Fincher of Topeka, Kansas. Respondent, a self-insured, appeared by its attorney, Gregory J. Bien of Topeka, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board for the purpose of this Award. In addition, the Appeals Board will consider whether the deposition of Daniel D. Zimmerman, M.D., taken by claimant on June 30, 1998, should be considered as part of the record, even though it was neither listed by nor considered by the Administrative Law Judge in his Award. The parties stipulated at oral argument that, if the Appeals Board allows the deposition of Dr. Zimmerman, a remand to the Administrative Law Judge is unnecessary, and the Appeals Board may decide the issues raised on this appeal.

ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment with respondent on the date alleged?

- (2) Is the deposition of Daniel D. Zimmerman, M.D., properly a part of this record to be considered by the Appeals Board for the purpose of this appeal?

If the Appeals Board reverses the Administrative Law Judge on the issue of whether claimant suffered accidental injury arising out of and in the course of employment, the following issues will then be considered:

- (1) What is the nature and extent of claimant's injury? The parties stipulate there is no work disability claimed in this matter, as claimant's request is for a functional impairment only.
- (2) Did claimant provide timely notice pursuant to K.S.A. 44-520 and, if not, was there just cause for claimant's failure to provide timely notice?
- (3) What was claimant's average weekly wage on the date of accident?
- (4) Did claimant provide timely written claim pursuant to K.S.A. 44-520a?
- (5) Is claimant entitled to unauthorized medical care?
- (6) Is claimant entitled to future medical care?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Claimant, a 46-year old, 13-year employee of respondent, is head building operator (custodian) for respondent. Claimant alleges that, on March 21, 1995, while descending a 12- to 14-foot ladder, after changing a light bulb, claimant missed a step and fell through the ladder. He let go of the light bulb, which broke on the floor, and grabbed the ladder. Claimant felt a pull and an immediate sensation of pain in the back of his neck and shoulders. The sensations included burning, tightness and radiculopathy down his left arm from the left side of his neck. Claimant continued working through the remainder of that day.

Claimant's condition improved and the symptoms went away. Approximately two weeks later, on the morning of April 10, 1995, claimant awoke at about 4:30 in the morning

with a sharp pain in his neck and shoulders. Claimant went to work that day and, while setting up a table, again experienced pain. On the morning of April 11, 1995, at approximately 5:00 a.m., claimant was again awakened by the pain. This time claimant was taken to the emergency room. X-rays were taken and an MRI performed, and a cervical herniated disc was diagnosed at C6-C7.

On April 25, 1995, claimant filled out an accident report with respondent and reported to Jana Grant, the finance records clerk, that he had suffered a work-related injury, reporting the date of injury as April 10, 1995. However, in this litigation, claimant has alleged an accidental injury on March 21, 1995. No E-1 has ever been filed with the Division of Workers Compensation alleging an accidental injury on or about April 10, 1995.

Respondent also took the deposition of Barbara Davis, the Director of Curriculum and Instruction for the Topeka Public Schools. At the time of claimant's accident, Ms. Davis was the principal at Stout Elementary School, where claimant worked as her custodian. Ms. Davis recalled seeing claimant the week of March 21, 1995, which apparently was spring break, but was not advised by claimant of any fall or injury occurring during that week. Ms. Davis was available for claimant to talk to, had he so desired.

The employee injury report form prepared by claimant indicated that claimant had "followen" off a ladder in the kindergarten room, which is room 12, about five years ago. This document is dated April 19, 1995, and was signed by claimant. Claimant was referred to Sharon L. McKinney, D.O., a physical medicine and rehabilitation specialist, on April 25, 1995. Dr. McKinney took a history from claimant, including the fact that he awoke one morning, approximately two weeks before, with severe pain in his left shoulder blade and arm. Claimant reported no known injuries to Dr. McKinney, other than falling off a ladder four years before. Dr. McKinney ran a series of tests on claimant, diagnosing C6 or C7 radiculopathy, with a number of abnormalities appearing on the nerve conduction tests.

Claimant was then referred to John David Ebeling, M.D., a neurosurgeon, for consult and treatment. Claimant reported to Dr. Ebeling that he fell from a ladder on March 17, 1995, which may have resulted in the neck and shoulder injury suffered by claimant. Dr. Ebeling performed a physical examination, examined x-rays and MRIs of the cervical spine, and diagnosed a small left C6-C7 herniated disc, impacting the axial of the nerve and narrowing the foramen. He diagnosed a C7 radiculopathy, with a herniated disc at C6 to C7, and recommended an anterior cervical discectomy and fusion.

Claimant underwent the recommended procedure under the hands of Dr. Ebeling and, on July 20, 1995, reported feeling 100 percent better. He still had some interscapular discomfort and trapezius area discomfort, but the left arm pain was gone. Dr. Ebeling returned claimant to work without restrictions on September 1, 1995, and claimant continued working for respondent at a comparable wage.

The depositions of both Dr. Ebeling and Dr. McKinney were taken by respondent. Dr. Ebeling was asked whether he felt claimant's cervical problems stemmed from the March 21, 1995, accident. Dr. Ebeling testified that he did not connect the accident and claimant's cervical problems because, had there been a connection, claimant would have experienced symptoms sooner than April 10 or 11, 1995. Dr. McKinney was asked whether claimant reported any work-related injury which may have caused his pain, and she answered no.

On June 4, 1996, Michael Schmidt, M.D., was appointed as an independent health care examiner pursuant to the order of Special Administrative Law Judge William F. Morrissey to examine claimant and render an opinion regarding claimant's functional impairment. Dr. Schmidt examined claimant on November 18, 1996, issuing a report contemporaneous with that. He also issued a subsequent letter of February 4, 1997. At oral argument, the parties stipulated that the opinions of Dr. Schmidt and those reports could be considered as evidence in this matter.

Dr. Schmidt diagnosed claimant with mechanical cervical pain and mild residual radiculopathy post C6-C7 disc excision and fusion. He provided no functional impairment and no restrictions in that report, although he did advise he would be willing to do so if he was provided a job description. In the February 4, 1997, letter to Gregory Bien, Dr. Schmidt opined claimant had a 14 percent functional impairment of the body as a whole, resulting from the loss of cervical spine motion, and an 8 percent impairment based upon Table 53, Category II-E, from the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised). He then combined the ratings for a 21 percent whole person impairment. Dr. Schmidt went on to state that, in his opinion, claimant's cervical disc injury did not result from the work-related accident on March 21, 1995.

The deposition of Daniel D. Zimmerman, M.D., was scheduled by claimant's attorney, with a notice being submitted on May 15, 1998, showing a June 15, 1998, deposition. This deposition was then amended by an amended notice to take deposition submitted June 11, 1998, moving Dr. Zimmerman's deposition to June 30, 1998. The deposition notice gives no indication whether the deposition is to be considered for discovery or evidentiary purposes. The Appeals Board does note, however, that the notices to take deposition provided by the various parties do not indicate for any deposition whether the deposition is intended to be for discovery or evidentiary purposes.

At oral argument, it was noted that the deposition of Dr. Zimmerman was not listed by the Administrative Law Judge in the Award. On the front of Dr. Zimmerman's deposition, it does state that it is a "discovery telephonic deposition of Daniel D. Zimmerman, M.D."

Claimant contends that the deposition of Dr. Zimmerman was intended for the purpose of evidence and was not a discovery deposition. Argument was presented that that discovery deposition designation was a mistake on the part of the court reporter.

Respondent's attorney was not willing to stipulate that the deposition of Dr. Zimmerman was for evidentiary purposes, but could not recall whether it had been noticed as a discovery deposition or evidentiary deposition. Respondent's attorney acknowledged being present at the deposition and having the opportunity to cross-examine Dr. Zimmerman at length. It was noted that the original of Dr. Zimmerman's deposition was not on file with the Division of Workers Compensation. The parties have agreed that, should the Appeals Board consider this to be part of the record, no remand to the Administrative Law Judge is necessary.

CONCLUSIONS OF LAW

The Appeals Board will first consider whether the deposition of Dr. Zimmerman should be considered as part of the record in this award. The deposition notice and the amended deposition notice provided by claimant for the deposition of Dr. Zimmerman provide no indication whether this deposition was intended for the purpose of discovery or evidence. The only indication that this is a discovery deposition is contained on the front of the deposition transcript itself. The Appeals Board acknowledges that, at one time, it was common to take the discovery deposition of a claimant, especially when considering the liability of the Kansas Workers Compensation Fund. However, the Appeals Board members collectively cannot recall a medical expert's testimony being taken as a discovery deposition. This situation, while not unheard of in workers' compensation, would be rare. Respondent's attorney would not stipulate that the deposition was intended for the purpose of evidence, but also was not willing to state the deposition was intended for discovery purposes only either. Claimant's attorney argues emphatically that the deposition was intended for the purpose of evidence and should be considered as part of the record.

The Appeals Board, in considering the common practice among litigating attorneys in workers' compensation matters in Kansas, finds that, as it would be extremely unusual for a medical deposition to be taken as a discovery deposition, Dr. Zimmerman's deposition was intended for the purpose of evidence and should be included in this record.

The Appeals Board will next consider whether claimant has proven accidental injury arising out of and in the course of his employment with respondent. Claimant alleges accidental injury on March 21, 1995, when he fell from a ladder. While claimant described an incident on April 10, 1995, while moving furniture, no claim for that alleged injury has ever been filed, and no request to amend claimant's claim has ever been presented to the Workers Compensation Division. Therefore, the Appeals Board will confine its consideration of this situation to the March 21, 1995, date of accident only. At the time of the accident, claimant was changing a light bulb and alleges he fell from a ladder. As claimant grabbed the ladder to keep from falling, he felt immediate pain in his neck and shoulders, including a burning sensation, tightness and radiculopathy down his left arm. Claimant continued working that day, and the symptoms resolved. Claimant did not again have symptoms until April 10, 1995, when he awoke with pain. Claimant did not report the matter to any of respondent's representatives, even though Barbara Davis, claimant's then

principal, was present at school during that week and was available should notice have been attempted. In addition, claimant reported to two different doctors and filled out an accident form indicating that the symptoms occurred as a result of a fall several years prior. Claimant did not report the March 21, 1995, accident until approximately April 19, 1995.

Dr. Ebeling, claimant's treating neurosurgeon, opined that, if claimant had suffered a herniation of a cervical disc on March 21, 1995, his symptoms would have appeared substantially sooner than April 10, 1995. Dr. Schmidt, the court-ordered independent medical examiner, also opined that he did not believe claimant's cervical injuries stemmed from the March 21, 1995, incident. Only Dr. Zimmerman, claimant's expert, was willing to find a causal effect between the March 21, 1995, fall and claimant's cervical problems. However, Dr. Zimmerman did not examine claimant until March 18, 1998, nearly three years after the date of accident.

The Appeals Board, after considering the entirety of the evidence, concludes that claimant has failed to prove accidental injury arising out of and in the course of his employment with respondent on March 21, 1995. Therefore, the Appeals Board finds that the Award of Administrative Law Judge Bryce D. Benedict, denying claimant benefits, should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated October 30, 1998, should be, and is hereby, affirmed, and an award in favor of the claimant, Leon R. Snoe, and against the respondent, U.S.D. No. 501, a qualified self-insured, is denied.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent to be paid as follows:

Nora Lyon & Associates	\$180.80
Appino & Biggs Reporting Service	\$248.30
Jay E. Suddreth & Associates, Inc. Deposition of Dr. Daniel D. Zimmerman	Unknown

IT IS SO ORDERED.

Dated this ____ day of May 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Topeka, KS
Gregory J. Bien, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director